

## **DEFENDANT MUST BE PRESENT AT SENTENCING — Sentencing in absentia is not permitted — Revised 2/2010**

A defendant can waive his right to be present at trial and at all other stages of the proceeding, except for sentencing. In Arizona, the defendant's presence at sentencing is mandatory under Rule 26.9, Ariz. R. Crim. P., which provides:

### Presence of the Defendant

**The defendant** is entitled to be present at a pre-sentencing hearing and **shall be present at sentencing**. In a capital case, the defendant is entitled to be present at both the aggravation and penalty hearings, and the return of any verdict.

[Emphasis added.] This rule prohibits sentencing in absentia except in the most extraordinary circumstances. In *State v. Fettis*, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983), the Arizona Supreme Court stated, "We would anticipate that these circumstances would be rare indeed." Merely refusing to attend the sentencing is not an extraordinary circumstance to justify sentencing *in absentia*. *State v. Forte*, 222 Ariz. 389, ---, 214 P.3d 1030, 1034 (App. 2009).

However, the defendant need not be physically present — he may be present by telephone. In *State v. Adler*, 189 Ariz. 280, 942 P.2d 439 (1997), a defendant charged with violating his Arizona probation was being held in a federal prison outside Arizona on other charges. The defendant requested that the final disposition in the probation violation case be held in absentia, and eventually appeared with counsel via telephone. The Arizona Supreme Court approved that procedure, stating:

Although sentencing in absentia is undesirable, sentencing with counsel present and the defendant present by telephone with consent is entirely different. Sentencing in absentia is not permitted because the time for appeal begins to run from the entry of judgment and sentence whether or not the defendant is present and the defendant needs to be advised of appeal rights. Additionally, an absent

defendant loses the opportunity to exercise his right of allocution and the judge is not able to personally question and observe the defendant. The telephonic presence alleviates most of these concerns, particularly where, as here, it is with defendant's consent.

*Id.* at 285, 942 P.2d at 444 [citations omitted]. See also *State v. Forte*, 222 Ariz. 389, ---, 214 P.3d 1030, 1034 (App. 2009) (affirming the use of audiovisual equipment in lieu of personal presence, as long as all procedural steps are appropriately followed).

Because “[r]estitution is part of the sentencing process”, *State v. Cummings*, 120 Ariz. 69, 583 P.2d 1389 (App.1978), the defendant must be present when the court orders him to pay restitution. *State v. Lewus*, 170 Ariz. 412, 414, 825 P.2d 471, 473 (App. 1992).

Rule 26.9, Ariz. R. Crim. P., clearly implies that a defendant may waive the right to be present at a presentence hearing. *State v. Amaya-Ruiz*, 166 Ariz. 152, 175, 800 P.2d 1260, 1283 (1990). A defendant may also waive his right to appear at an aggravation hearing. *State v. Roberts*, 144 Ariz. 572, 574, 698 P.2d 1291, 1293 (App. 1985). The requirement that a defendant be present for sentencing does not mean that he must be present when the sentencing date is set. "The scheduling of a sentencing date was a mere housekeeping matter during which no argument was heard, no other issues were addressed, and defendant could have contributed nothing." *State v. Schackart*, 190 Ariz. 238, 256, 947 P.2d 315, 333 (1997), *cert. denied* 525 U.S. 862 (1998).